ANNUAL REPORT
2014-15

Copyright Board of Canada

Copyright Board
of Canada

CANADA

Commission du droit d'auteur
du Canada

August 31, 2015

The Honourable James Moore, P.C., M.P.
Minister of Industry
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the twenty-seventh Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2015.

Yours sincerely,

Claude Majeau

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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Board Members and Staff

as of March 31, 2015

Chairman:	Vacant
Vice-Chairman and Chief Executive Officer:	Claude Majeau
Member:	J. Nelson Landry
Secretary General:	Gilles McDougall
Acting General Counsel:	Chantal Carbonneau
Senior Legal Counsel:	Sylvain Audet
Legal Counsel:	Valérie Demers
Counsel:	Marko Zatowkaniuk
Articling Student:	Karine Boisjoly-Létourneau
Director, Analysis and Research:	Dr. Raphael Solomon
Acting Senior Clerk:	Nadia Campanella
Assistant Clerks:	Maryse Choquette Roch Levac
Registry Officers:	Sid Bateman Tina Lusignan
Manager, Corporate Services:	Nancy Laframboise
Financial and Administrative Assistant:	Denise Guénette
Technical Support Officer:	Michel Gauthier
Administrative Assistant:	Josée Labrèche

Copyright Board of Canada

Vice-Chairman and CEO's Message

I am pleased to present the 2014-15 Annual Report of the Copyright Board of Canada. This report documents the Board's activities during the year in relation to its mandate of setting fair and equitable royalties to both rights owners and users of copyright-protected works.

In 2014-15, the Board held two hearings dealing with the communication to the public and reproduction of musical works by online music services and with the reproduction of literary works by elementary and secondary schools.

In addition, the Board issued a total of nine final or interim decisions. Three of those decisions concerned Re:Sound tariffs in respect of the use of recorded music to accompany fitness activities and non-interactive and semi-interactive webcasts. Three decisions dealt with SOCAN tariffs in respect of online audiovisual services as well as user-generated content, and concerts. Another dealt with a tariff of the Canadian Broadcasters Rights Agency in relation to media monitoring. Finally, a decision pertained to private copying and one interim decision dealt with the SOCRAC v. ARTV arbitration.

These decisions are summarized in this report together with Court decisions affecting decisions of the Board, in particular those of the Federal Court of Appeal.

The Board also issued seven licenses pursuant to the provisions of the *Copyright Act*, which permit the use of published works when copyright owners cannot be located. In addition, Board staff assisted a number of individuals and organizations requesting a licence to locate the copyright owner thereby facilitating the use of published works.

In response to the need expressed by some to re-examine the Board's procedures, the Board established in November, 2012, an ad hoc committee to look into its operations, procedures and processes. In December, 2014, the committee finalized a discussion paper dealing with the identification and disclosure of issues to be addressed during a tariff proceeding and with the interrogatory process. The paper was released for public consultations in February, 2015. Consultations were ongoing at the end of the reporting period. After reviewing the comments and responses received, the Board will make public the changes it will implement. I thank the members of the committee for their valuable contribution this process. I look forward to their recommendations on issues that are central to the efficient operation of the Board, including case management and scheduling.

We as a Board strived to render decisions in a timely manner in a context of an ever-increasing number and complexity, both economic and legal, of the issues that come before it. I underline that it is only with the assistance of the dedicated professional and support staff that we are able to cope with the demands made upon the Board and render as many decisions as we did within a reasonable time frame. The Board is fortunate to have such qualified and dedicated employees who truly bring meaning to the concept of public service. Their expertise and work ethic make the work of the Board possible.

Finally, and on behalf of the Board, I would like to take this opportunity to thank Justice Vancise who has been our Chairman for the last ten years. I want to publicly recognize the exceptional contribution he made to the Board's work and its decisions. His level of energy, devotion, involvement, motivation and his intellectual leadership were truly an example and source of inspiration for all of us. Never, under any other chairmanship, have issues before the Board been so numerous, complex, new and challenging. Justice Vancise rose to the challenge with an exceptional determination.

Claude Majeau

Copyright Board of Canada

Mandate of the Board

The Copyright Board of Canada (the "Board") was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licenses when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the "*Act*") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions, and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a license.

The responsibilities of the Board under the *Act* are to:

- certify tariffs for
  - the public performance or the communication to the public by telecommunication of musical works and sound recordings;
  - the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act*, such as the reproduction of musical works, of sound recordings, of performances and of literary works; and,
  - the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes;
- set levies for the private copying of recorded musical works;
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions;
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located;
- examine agreements made between a collective society and a user which have been filed with the Board by either party, where the Commissioner of Competition considers that the agreement is contrary to the public interest;
- receive such agreements with collective societies that are filed with it by any party to those agreements within 15 days of their conclusion;
- determine the compensation to be paid by a copyright owner to a person to stop her from performing formerly unprotected acts in countries that later join the *Berne Convention*, the *Universal Convention* or the *Agreement establishing the World Trade Organization*; and,
- conduct such studies with respect to the exercise of its powers as requested by the Minister of Industry.

Operating Environment

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to create the Copyright Appeal Board.

On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (*An Act to amend* the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings ("the neighbouring rights"), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings ("the home-taping regime") and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes ("the educational rights").

The *Copyright Modernization Act* (Bill C-11) received Royal Assent on June 29, 2012, and many of its provisions came into force on November 7, 2012. Though this legislation does not change the mandate of the Board or the way it operates, it provides for new rights and exceptions that will affect the Board's work.

The coming into force of new distribution and making available rights for authors, performers and makers of sound recordings, and the addition of education, parody and satire as allowable fair dealing purposes may affect existing and future tariffs or licences. New or modified exceptions dealing with non-commercial user-generated content, reproductions for private purposes, program copying for the purpose of time-shifting, backup copies, ephemeral copies by broadcasting undertakings and certain activities of educational institutions, among others, may affect some uses that are or may be subject to a Board tariff.

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearing has been held to date for a request to use a work whose owner cannot be located. Information is obtained either in writing or through telephone calls.

The examination process is always the same. Tariffs come into effect on January 1. On or before the preceding March 31, the collective society must file a statement of proposed royalties which the Board then publishes in the *Canada Gazette*. Users (or, in the case of private copying, any interested person) or their representatives may object to the statement within 60 days. The collective society and the objectors present oral and written arguments. After deliberation the Board certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons for its decision.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the specific circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at any time. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariffs; the practicality of the administration to avoid tariff structures that make it difficult to administer the tariff in a given market; the search for non-discriminatory practices; the relative use of protected works; the taking into account of the Canadian environment; the stability in the setting of tariffs that minimizes disruption to users; as well as the comparisons with "proxy" markets and comparisons with similar prices in foreign markets.

Working Committee on the Operations, Procedures and Processes of the Copyright Board

The need to re-examine the Board's procedures has been discussed for some time. The June, 2014 report of the Standing Committee of the House of Commons on Canadian Heritage entitled *Review of the Canadian Music Industry* documents a wide consensus in two respects. First, the Board provides a valuable service to both rights holders and copyright users by ensuring payment for protected uses and by providing marketplace certainty. Second, it takes too long to render decisions, largely because of a lack of resources. The Standing Committee recommended dealing with delays ahead of the five-year review of the *Copyright Act* due in 2017. The Government preferred to leave the matter with the Board for the time being, adding that the five-year review would be "an opportune moment to consider important copyright issues, such as the broader framework in which the Copyright Board operates."

On November 26, 2012, the Board had established a committee of seasoned practitioners representing copyright users and owners to look into its operations, procedures and processes. The terms of reference, finalized in June, 2013, are as wide as they are clear: to conduct a thorough review of the Board's processes in general and of the Directive on Procedure in particular; without limitation, to review the various steps of proceedings before the Board so that they can be made more efficient; and to suggest tools to improve access to decisions and help focus applications based on earlier rulings in similar matters. These terms go beyond examining specific questions about the hearing procedure itself, within the Board's existing framework.

To start with, the Committee identified three areas which it found amenable to significant improvements within a fairly short time frame: the identification and disclosure of issues to be addressed during a tariff proceeding, interrogatories, and the confidential treatment of information. In December, 2014, the committee finalized a discussion paper dealing with the first two sets of issues. The paper was emailed to known stakeholders and posted on the Board's web site in February, 2015. Comments were received in March. Responses

were for April of the Board's next reporting period. After reviewing the comments and responses received, the Board will make public the changes it will implement.

With respect to the identification and disclosure of issues to be addressed during a tariff proceeding, the committee recommends that the Board and its stakeholders develop and progressively implement new ways of notifying users about proposed tariffs. Electronic notice should be favoured over paper notification. The most efficient form of communication for each user type in each situation should be used. Trusted third parties should be identified through whom more loosely organized user groups could be notified of proposed tariffs. The Board should use its power to cause notices to be distributed only if experience proves that this is the only means through which adequate publicity can be compelled: cooperation should be favoured over compulsion.

The committee also recommends that parties inform each other of their position in the matter long before statements of cases are filed. A collective should provide, with the proposed tariff, on a without prejudice basis, information about the content of a tariff of first impression and about the nature, purpose and ambit of any proposed material change to an existing tariff. Objectors, having received this information, would be asked to explain early on why they object to the proposed tariff.

With respect to the interrogatory process, the paper's stated objectives are to minimize the burden of the process on parties, to streamline it, to reduce disputes and to prevent the process from being a bar to the participation of some stakeholders. The recommendations largely propose to retain the status quo. Some level of non-constraining involvement on the part of the Board early on is recommended as a tool to help the parties better focus their questions, based in part on the tentative positions offered by the parties early on in the process. In the end, however, real decisions about the relevance and extent of interrogatories would be made, as they are now, when the person being asked a question objects to it.

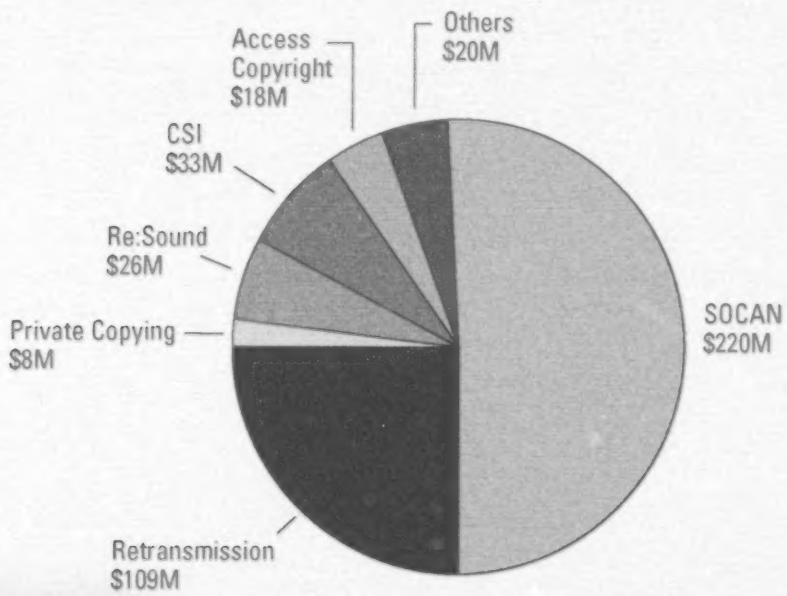
With respect to confidentiality, a subcommittee has been developing a draft issues paper, which should be circulated to the committee, sent to the Board and released during the Board's next reporting year.

The committee has been asked to establish its next set of priorities, using its terms of reference as starting point. The choice of priorities is expected to account for concerns raised in the comments received in March, 2015 about the need to focus on reforms that will bring about true efficiencies: case management; scheduling; dealing with tariffs that are unopposed or agreed upon; the amount of time it takes for a proceeding to begin; and requiring a statement of issues prior to filing interrogatories.

Royalties Generated by the Board's Tariffs

The total amount of royalties generated by the tariffs the Board certifies is estimated at $434 million per year. The following chart shows the allocation of these royalties among the various collective societies. SOCAN receives the most important share of these royalties, corresponding to more than half of the total. The nine retransmission collectives together come in second, followed by CSI and Re:Sound. More than half of the royalties generated by the Board's tariffs are being paid by the radio and television broadcasters defined broadly.

Royalties generated by the Board's tariffs, 2013



Copyright Board of Canada

Organization of the Board

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.

Chairman

The position is vacant.

Vice-Chairman and Chief Executive Officer

Claude Majeau was appointed as full-time Vice-Chairman and Chief Executive Officer in August 2009 for a five-year term and reappointed in 2014 for a three-year term. He occupied the position of Secretary General of the Copyright Board from 1993 until his appointment as Vice-Chairman. Before joining the Board, Mr. Majeau worked for the Department of Communications of Canada from 1987 to 1993 as Director (Communications and Culture) for the Quebec Region. From 1984 to 1987, he was Chief of Staff to the Deputy Minister of the same department. Before 1984, he occupied various positions dealing with communications and cultural industries and public policy. Mr. Majeau earned an LL.B. from the *Université du Québec à Montréal* in 1977 and has been a member of the *Barreau du Québec* since 1979.

Member

J. Nelson Landry was appointed in February 2010 as a part-time member for five years and reappointed in 2015 for a three-year term. Mr. Landry has served as a domain name arbitrator for the World Intellectual Property Organisation (WIPO) since 2001. From 2002 to 2005, he was an instructor for the Patent Agent Training Course – Infringement and Validity at the Intellectual Property Institute of Canada. In 2003, he gave a management of intellectual property course at the MBA level at the *Hautes Études Commerciales* of the *Université de Montréal* and from 1969 to 2002, Mr. Landry was a lawyer at Ogilvy Renault where he retired as senior partner in 2002. Mr. Landry obtained a BA in 1959 and a BSc in 1965 from the *Université de Montréal*. He also graduated with a B.C.L. from McGill University in 1968 and was called to the Quebec Bar in 1969.

The Board is a micro-organization, consisting of 16 employees organized in five functional groups:

- Legal Analysis Group
- Research and Analysis Group
- Secretariat
- Ministerial Services
- Technical Support

From left to right, first row: Michel Gauthier, Nadia Campanella, Chantal Carbonneau, Valérie Demers, Maryse Choquette, Claude Majeau, Marjolaine Jarry, Gilles McDougall

Second row: Tina Lusignan, Marko Zatowkaniuk, Raphael Solomon, Nancy Laframboise, Roch Levac, Sylvain Audet

Not shown in the photo: Sid Bateman, Josée Labrèche

Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2014-15 (Part III of the Estimates) and the Performance Report for 2014-15. These documents are or will soon be available on the Board's Web site (www.cb-cda.gc.ca).

Copyright Board of Canada

Collective Administration of Copyright

In Canada, the collective administration of copyright is supported by a number of collective societies. These collective societies are organizations that administer the rights of several copyright owners. They can grant permission to use their works and set the conditions for that use. Some collective societies are affiliated with foreign societies; this allows them to represent foreign copyright owners as well.

The Board regulates Canadian collective administration organizations through one of the following regulatory regimes.

Public Performance of Music

The provisions beginning with section 67 of the *Act* deal with the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television (including cable and satellite) or the Internet. Collective societies collect royalties from users based on the tariffs certified by the Board.

Two collective societies operate under this regime:

- The Society of Composers, Authors and Music Publishers of Canada (SOCAN) administers the right to perform in public or to communicate to the public by telecommunication musical works;
- Re:Sound Music Licensing Company (Re:Sound) collects royalties for the equitable remuneration of performers and makers for the performance or communication of sound recordings of musical works.

General Regime

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes.

There are a number of collective societies operating under this regime, including the following:

- Access Copyright, The Canadian Copyright Licensing Agency (Access Copyright) represents writers, publishers and other creators for the reproduction rights of works published in books, magazines, journals and newspapers. It licenses uses in all provinces except Quebec;
- The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) represents similar rights owners as Access Copyright, but for uses in Quebec;
- Artisti is the collective society founded by the *Union des artistes* (UDA) for the remuneration of performers' rights;
- ACTRA Recording Artists' Collecting Society ("ACTRA RACS"), a division of ACTRA Performers' Rights Society ("ACTRA PRS"), collects and distributes equitable remuneration for eligible recording artists;

- CONNECT Music Licensing (formerly known as Audio-Video Licensing Agency (AVLA)) (CONNECT) administers licences in Canada for the reproduction of sound recordings, and the reproduction and broadcast of music videos on behalf of all the major record companies, many independent labels, as well as artists and producers;
- The *Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec* (SOPROQ) administers similar rights as CONNECT. Its members are mostly Francophone independent record labels;
- The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming and excerpts of programming owned by commercial radio and television stations and networks in Canada;
- The Canadian Musical Reproduction Rights Agency (CMRRA) collects royalties on behalf of Canadian and U.S. publishers for the reproduction rights of musical works in Canada;
- The Musicians' Rights Organization Canada (MROC) collects royalties on behalf of musicians and vocalists for the public performance of their recorded works;
- The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) administers royalties stemming from the reproduction of musical works. It represents members mostly from the province of Quebec; and,
- CMRRA/SODRAC Inc. (CSI), a joint venture of CMRRA and SODRAC, licenses the reproduction rights of songwriters and music publishers whose songs are active in the Canadian market place.

More details about other collective societies operating under this regime can be found on the Board's website at: **http://www.cb-cda.gc.ca/societies-societes/index-e.html**

Retransmission of Distant Signals

Sections 71 to 76 of the *Act* provide for royalties to be paid by cable companies and other retransmitters for the retransmission of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

There are currently nine collective societies receiving and distributing royalties under this regime:

- The Border Broadcasters Inc. (BBI) represents the U.S. border broadcasters;
- The Canadian Broadcasters Rights Agency Inc. (CBRA) represents commercial radio and television stations and networks in Canada;
- The Canadian Retransmission Collective (CRC) represents all PBS and TVOntario programming (producers) as well as owners of motion pictures and television drama and comedy programs produced outside the United States;

- The Canadian Retransmission Right Association (CRRA) represents the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and *Télé-Québec*;
- The Copyright Collective of Canada (CCC) represents copyright owners (producers and distributors) of the U.S. independent motion picture and television production industry for all drama and comedy programming;
- The Direct Response Television Collective Inc. (DRTVC) claims royalties for all television programs and underlying works in the form of direct response television programming (defined as "infomercials");
- FWS Joint Sports Claimants Inc. (FWS) represents the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues;
- The Major League Baseball Collective of Canada Inc. (MLB) claims royalties arising out of the retransmission of major league baseball games in Canada; and,
- SOCAN, representing owners of the copyright in the music that is integrated in the programming carried in retransmitted radio and television signals.

Educational Rights

Under sections 29.6, 29.7 and 29.9 of the *Act*, educational institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff, pursuant to sections 71 to 76 of the *Act*.

There is currently however no collective society representing the interests of copyright owners for this regime.

Private Copying

The private copying regime, as set in sections 79 to 88 of the *Act*, entitles an individual to make copies (a "private copy") of sound recordings of musical works for that person's personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid.

The Canadian Private Copying Collective (CPCC) is the collective society for the private copying levy, collecting royalties for the benefit of eligible authors, performers and producers. The member collectives of the CPCC are CMRRA, Re:Sound, SODRAC and SOCAN.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, when a collective society and a user are unable to agree on the terms of the license and on application filed by either one of them, the Board can set the royalties and the related terms and conditions of a license for the use of the repertoire of a collective society to which section 70.1 applies.

Tariffs Proposed by Collective Societies

In March 2015, the following collective societies filed their proposed statements of royalties to be collected in 2016 and beyond:

Access Copyright

- Proposed tariff for the reprographic reproduction of literary works by employees of educational institutions, 2016-2019.

Artisti

- Proposed tariff for the fixation of performances and the reproduction and distribution of performances fixed by performers in the form of phonograms, 2016-2018.
- Proposed tariff for making available to the public and for the reproduction, in Canada, of performances fixed in a sound recording by online music services, 2016-2018.

CMRRA

- Proposed tariff for the reproduction of musical works embodied in music videos by online music services, 2016 (Tariff 4).
- Proposed tariff for the reproduction of musical works by commercial television stations, 2016 (Tariff 5).
- Proposed tariff for the reproduction of musical works by the Television Services of the Canadian Broadcasting Corporation, 2016 (Tariff 6).
- Proposed tariff for the reproduction of musical works by audiovisual services, 2016 (Tariff 7).

CSI

- Proposed tariff for the reproduction of musical works by commercial radio stations, 2016.
- Proposed tariff for the reproduction of musical works by non-commercial radio stations, 2016.
- Proposed tariff for the reproduction of musical works by online music services in 2016.

SOCAN

- Proposed tariffs for the public performance or the communication to the public by telecommunication of musical or dramatico-musical works, 2016:
  - Tariff 1.A – Commercial Radio
  - Tariff 1.B – Non-Commercial Radio
  - Tariff 1.C – CBC Radio
  - Tariff 2.A – Commercial Television Stations
  - Tariff 2.B – Ontario Educational Communications Authority
  - Tariff 2.C – Société de télédiffusion du Québec
  - Tariff 2.D – Canadian Broadcasting Corporation
  - Tariff 6 – Motion Pictures Theatres
  - Tariff 9 – Sports Events
  - Tariff 15.A – Background Music in Establishments not Covered by Tariff No. 16 – Background Music
  - Tariff 15.B – Background Music in Establishments not Covered by Tariff No. 16 – Telephone Music on Hold
  - Tariff 16 – Background Music Suppliers
  - Tariff 17 – Transmission of Pay, Specialty and Other Television Services by Distribution Undertakings
  - Tariff 22 – Internet
  - Tariff 24 – Ringtones and Ringbacks
  - Tariff 26 – Pay Audio Services

- Proposed tariff for the public performance or the communication to the public by telecommunication of musical or dramatico-musical works, 2016-2018:
  - Tariff 25 – Satellite Radio Services

SODRAC

- Proposed tariff for the reproduction of musical works embedded into cinematographic works for the purpose of distribution of copies of the cinematographic works for private use or theatrical exhibition, 2016 (Tariff 5).
- Proposed tariff for the reproduction of musical works embedded in musical audiovisual works for their transmission by a service, 2016 (Tariff 6).
- Proposed tariff for the reproduction of musical works embedded in audiovisual works for their transmission by a service, 2016 (Tariff 7).

Re:Sound

- Proposed tariff for the communication to the public by telecommunication and the performance in public of published sound recordings embodying musical works and performers' performances of such works by commercial radio simulcasts, 2016-2017 (Tariff 1.A.2).
- Proposed tariff for the communication to the public by telecommunication and the performance in public of published sound recordings embodying musical works and performers' performances of such works by the Canadian Broadcasting Corporation (CBC) simulcasts, 2016 (Tariff 1.C.2).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works by pay audio services simulcasts, 2016 (Tariff 2.B).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works by multi-channel subscription satellite radio services simulcasts, 2016-2018 (Tariff 4.B).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works in respect of the use of music to accompany live events, 2016-2020 (Tariff 5.A-J).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works in respect of the use of recorded music to accompany dance, 2016-2018 (Tariff 6.A).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works in respect of the use of recorded music to accompany adult entertainment, 2016-2018 (Tariff 6.C).
- Proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works in respect of non-interactive and semi-interactive webcasts, 2016 (Tariff 8).

Requests for Arbitration

The Board did not receive any request for arbitration in the year 2014-15.

On May 26, 2014, SODRAC informed the Board that it had reached an agreement with Bell Media Inc. On July 14, 2014, SODRAC also informed the Board of an agreement reached with Corus Entertainment Inc. Pursuant to subsection 70.3(1) of the *Act*, the Board did not proceed with the examination of these applications.

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Hearings

During the fiscal year, the Board held two hearings. The first concerned the communication to the public by telecommunication and the reproduction of musical works by online music services. This hearing took place in November 2013, and final arguments were made in May 2014. The parties participating in the hearing were SOCAN, CSI, SODRAC, Apple Canada Inc. and Apple Inc., the Canadian Association of Broadcasters, Bell Canada, Rogers Communications, Quebecor Media Inc., TELUS, Videotron G.P., and Pandora Media Inc.

The second hearing concerned the reproduction right of literary works by elementary and secondary schools. The hearing took place in April and May of 2014 and final arguments were heard in September 2014. The parties involved were Access Copyright and a number of education ministries as well as school boards, represented as a single objector.

Decisions

During the fiscal year 2014-15, the following nine decisions in respect of the indicated collective society and tariff were rendered:

Canadian Broadcasters Rights Agency

August 8, 2014 – CBRA Tariff for the Fixation and Reproduction of Works and Communication Signals, in Canada, by Commercial and Non-Commercial Media Monitors, 2011-2016

On March 30, 2010 and March 28, 2013, the Canadian Broadcasters Rights Agency (CBRA) filed proposed statements of royalties to be collected for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitors for the years 2011 to 2013 and 2014 to 2016, respectively.

In September 2010, J&A Media Services filed an objection to the proposed tariff for commercial media monitoring the years 2011 to 2013. There were no objectors to the tariffs for the years 2014 to 2016. No one objected to the tariff for non-commercial services for the years 2011 to 2016.

CBRA collects royalties for programs and program excerpts owned by commercial radio and television stations and networks in Canada. CBRA proposed rates of 14 per cent of the monitor's gross income related to a CBRA program or signal for the commercial media monitoring tariff and of 14 per cent of the monitor's gross monitoring costs related to a CBRA program or signal in the case of the non-commercial media monitoring tariff. The last certified tariff rates were 10 per cent for the two media monitoring tariffs. With the exception of the rates, the proposed tariffs replicate the 2009-2010 certified tariffs.

J&A Media Services argued that a rate of 14 per cent would be too high and would hurt the commercial media monitoring industry. This claim was not supported by any evidence or argument. CBRA stated that it proposed to increase the commercial media monitoring tariff to 14 per cent after being informed that the Canadian Broadcast Corporation (CBC) was licensing its broadcast material at this rate. In absence of evidence that an increase in the tariff rate would financially prejudice the commercial media monitoring industry and given that no other commercial media monitor objected to the increase, the Board certified a tariff rate of 14 per cent for the years 2011 to 2013.

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As for non-commercial media monitoring, in an attempt to maintain parity between the non-commercial rate and the commercial rate, the proposed rate for the non-commercial media monitoring tariff was set by CBRA at 14 per cent. Several non-commercial media monitors have signed agreements with CBRA, at rates equal to or superior to 14 per cent. The agreed rates that are higher than the proposed tariff rate reflect additional rights and benefits included in the agreements. Furthermore, it appears that non-commercial media monitors that have not entered into an agreement with CBRA are paying the rate in the proposed tariff. In light of the evidence put forth by the parties following the Board's questions, the Board believed that it is appropriate to set a rate of 14 per cent, and certified the non-commercial media monitoring rate based on the filed agreements.

The Board also certified the tariffs for the years 2014 to 2016 as proposed by CBRA. These tariffs are essentially identical to the 2011 to 2013 proposed tariffs and were unopposed.

The rates certified by the Board are the following:

Categories of Tariff	Rate
Commercial Media Monitors	14% of the monitor's CBRA-related gross income.
Non-Commercial Media Monitors	14% of the monitor's CBRA-related gross income.

CPCC

December 12, 2014 – Private Copying, 2015-2016

On November 8, 2013, CPCC filed its proposed tariff for private copying for 2015 and 2016. CPCC proposed maintaining the private copying levy on CDs at $0.29. The Retail Council of Canada (RCC) and Mr. Sean Maguire objected to the proposed tariff.

On February 28, 2014, CPCC proposed a schedule of proceedings in which no interrogatory phase was requested. RCC agreed with the schedule provided that any reports should be filed in their entirety and that the decision whether or not to have a hearing should be taken only once the statement of case of CPCC has been filed. Mr. McGuire agreed to this second point. The Board adopted the schedule of proceedings, denied RCC's request for reports to be filed in their entirety and ruled that the manner in which the hearing would proceed would be determined later. On July 24, 2014, Mr. Maguire withdrew its objection. On July 25, 2014, RCC announced that it would not be filing a statement of case and was therefore deemed to have withdrawn from the proceedings. On September 12, 2014, the Board sent questions to CPCC. No hearing was held.

The Board found that CDs remain an audio recording medium. The Board accepted one of CPCC's techniques to forecast the values for the number of tracks copied on blank CDs, the percentage of all tracks copies, the number of CDs bought by individuals, and the percentage of music copied on CDs. While the percentage of music in copying on blank CDs and the number of CDs bought by individuals are two variables that carry less information for the purpose of this case, the two other variables remain relevant. For 2015 and 2016, the evidence showed that the number of tracks copies onto CDs was more than 170 million. This exceeds both the 2 million tracks level at which CDs were qualified initially as an "audio recording medium" as defined in the *Act*, and the 8.9 million tracks level at which cassettes were disqualified in 2010. The percentage of all copied tracks onto CDs is more than seven per cent. This exceeds both the five per cent level at which CDs were qualified initially and the two per cent level at which cassettes were disqualified in 2010. The trends in private copying onto CDs are clearly moving downward and absent of any change in behaviour, the Board believed that CDs will cease to qualify as an audio recording medium, possibly in 2017.

With respect to the rate, the Board maintained it at $0.29, concluding that it was a reality in the marketplace and that status quo would provide rights holders with some compensation while avoiding some of the perverse effects that too rigid a calculation based on actual consumption may have on the pricing of a good at the end of its life cycle.

The Board maintained the existing apportionment among the various rights holders: authors are entitled to 58.2 per cent of royalties, performers to 23.8 per cent and makers to 18.0 per cent.

Re:Sound

April 17, 2014 – Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities (2008-2012) [Interim Decision]

On July 6, 2012, the Board certified Re:Sound Tariff No. 6.B (Use of Recorded Music to Accompany Physical Activities). Re:Sound applied for judicial review of the decision certifying the tariff. On February 24, 2014, the Federal Court of Appeal granted the application in part. It set aside the tariff in so far as it concerns fitness classes, dance instruction, and other physical activities; the tariff was left untouched as it relates to skating. The Court remitted the matter to the Board for redetermination with directions.

On March 12, 2014, Re:Sound asked that the Board issue, pursuant to section 66.51 of the *Copyright Act*, an interim decision at the same rates and on the same terms as the 2012 tariff. The objectors to Tariff 6.B did not oppose the application.

As a result of the decision of the Federal Court of Appeal, Tariff 6.B was a nullity as it applied to several fitness activities. Since this was an inaugural tariff, there was no earlier tariff which could continue to apply on an interim basis pursuant to paragraph 68.2(3)(*b*) of the *Act*. Re:Sound could not collect royalties for such fitness activities until the Board had complied with the order of the Federal Court of Appeal.

Since the Re:Sound application for an interim tariff conformed with earlier decisions of the Board dealing with interim decisions, that it dealt with an inaugural tariff and that it was unopposed by the objectors, the application for an interim decision was granted. The interim tariff was applicable until the Board issues a further interim decision or a final decision.

The rates certified are the following:

Use of Music/Activities	Royalties Payable
Background Music (Fitness Venues) – *Interim*	3.2% of the amount paid to subscribe to a third-party music supplier or 0.0831¢ per admission
Fitness Classes – *Interim*	$105.74 per year, per venue
Dance Instruction and Other Physical Activities – *Interim*	$23.42 per year, per venue
Skating – *Final*	0.44% of the gross receipts from admissions, subject to a minimum of $38.18 Flat fee of $38.18 per year per venue if no admission fee is charged

May 16, 2014 – Re:Sound Tariff No. 8 – Non-interactive and Semi-interactive Webcasts, 2009-2012

In March 2008, Re:Sound filed a statement of proposed royalties for the communication to the public by telecommunication, by way of simulcasting and non-interactive webcasting, of published sound recordings embodying musical works and performers' performances of such works for the years 2009 to 2012 (Tariff 8.A). In March 2010, Re:Sound filed a statement of proposed royalties for communications by way of semi-interactive webcasting for the years 2011 and 2012 (Tariff 8.B). The examination of both proposed tariffs was subsequently consolidated.

The Objectors to the proposed tariffs were the *Alliance des radios communautaires du Canada*, the *Association des radiodiffuseurs communautaires du Québec* and the National Campus and Community Radio Association (collectively, NCRA), the Canadian Association of Broadcasters (CAB), the Canadian Broadcasting Corporation (CBC), Quebecor Media Inc., Rogers Communications Inc. and Shaw Communications Inc. (collectively, the Services), and Pandora Media Inc. (Pandora).

The Board addressed several issues and established several principles in this decision. First, it declined to set a royalty rate for simulcasting, or the substantially simultaneous streaming of a signal via the Internet. Having found that such activity is essentially ancillary to a primary activity (i.e. commercial radio, satellite radio, etc.), the Board decided to defer setting the value of simulcasting the next time it assesses the value of the primary activity.

Re:Sound had proposed a rate equal to the greater of two formulas, a percentage of revenue and a per-play rate, where a play corresponds to a single performance of a file to a single person. The Board decided to set only a per-play rate, since setting a "greater-of" tariff would provide an undue advantage to Re:Sound. In addition, a per-play rate correlates more directly with usage than a percentage rate.

Re:Sound offered as possible proxies agreements between major labels and webcasters operating in Canada and agreements between itself and these webcasters. CAB and Pandora proposed using SOCAN Tariff 22.F (Audio Websites) as proxy. After a detailed analysis, the Board concluded that the proposed agreements and foreign rates did not constitute proper proxies for this case, for several reasons.

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First, the agreements did not include a comparable set of rights. Second, the agreements were considered as experimental by the parties. Third, the agreements were closely aligned with US counterparts, and differences between the Canadian and the American copyright regimes are too important for the US agreements to be a valid proxy. Finally, the rates contained in Re:Sound's agreements with webcasters were deemed by the Board to be excessive and thus improper for use as proxies.

The Board further decided not to use SOCAN Tariff 22.F as proxy, in part because the evidence available did not permit the Board to do the necessary adjustments. In the end, the Board used SOCAN Tariff 1.A (Commercial Radio) as a proxy since commercial radio and webcasting services share many attributes and the evidence established that they compete with one another. The Board did not set an interactivity premium to take into account the greater ability of semi-interactive services to personalize webcasts, in part because of a lack of evidence on the value of such premium.

Although Re:Sound had proposed significant minimum fees, the Board set minima that are comparable to other tariffs, and nominal flat fees for webcasting offered by community and non-commercial radio systems represented by NCRA.

Re:Sound has filed an application for judicial review before the Federal Court of Appeal.

The rates certified were the following:

Use of Music/Activities	Royalties Payable
CBC	
Webcast	13.1¢ per thousand plays
Minimum fee	$100 per year
Commercial webcasters	
Webcast	10.2¢ per thousand plays
Minimum fee	$100 per year
Community and non-commercial webcasters	
Webcast	$25 per year

March 27, 2015 – Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities (2008-2012) [Redetermination]

On July 6, 2012, the Board certified Re:Sound Tariff No. 6.B (Use of Recorded Music to Accompany Physical Activities), 2008-2012 (*Tariff 6.B*). The tariff targets most forms of physical activities, including activities in fitness centres, fitness classes and group exercises, dance instruction and skating. The only two objectors were the Fitness Industry Council of Canada (FIC) and Goodlife Fitness Centres Inc. (Goodlife). On August 7, 2012, Re:Sound filed an application for judicial review before the Federal Court of Appeal (FCA).

On February 24, 2014, the FCA granted Re:Sound's application in part and set aside the decision of the Board approving *Tariff 6.B* for breach of the duty of fairness, in so far as it applies to royalties for the performance in public of recorded music to accompany fitness classes, dance instruction and other physical activities.

The Court found that a breach of duty of fairness had occurred as a result of the Board basing its decision on a ground that could not reasonably have been anticipated by those affected and that they did not have an opportunity to address. Specifically, that ground was the discounted amounts paid to SOCAN under individual licensing agreements by users to which SOCAN Tariff 19 (Fitness Activities and Dance Instruction) applied, which were not discussed during the hearing. The Parties did not have an opportunity to make submissions on whether these SOCAN Agreements relied upon by the Board were an appropriate proxy for the value of recorded music in the context of fitness classes and dance instruction. The FCA decision left *Tariff 6.B* untouched as it relates to the use of recorded music as background music in fitness areas and for skating.

The Court remitted the matter for redetermination by the Board after the Parties have had an opportunity to address the appropriateness of the ground on which the Board based its decision.

On March 21, 2014, Re:Sound filed with the Board an agreement (Settlement Tariff) reached with FIC and Goodlife on the rates and terms of a tariff to replace Tariff 6.B. Re:Sound, in concert with FIC and Goodlife, asked that the Board certify the Settlement Tariff as proposed.

On April 7, 2014, the Board, in accordance with the FCA's instructions, provided to the Parties copies of the SOCAN Agreements upon which the Board had

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based its July 6, 2012 decision and invited the Parties to comment on the appropriateness of using these agreements as a basis for establishing the royalty rates for the performance in public of recorded music to accompany fitness classes, dance instruction and other physical activities.

A review of the Parties' submissions, combined with the evidentiary shortcomings already identified in the original July 6, 2012 decision, led the Board to find that maintaining a rate based on the SOCAN Agreements for the use of recordings of musical works in fitness classes, dance instruction and other physical activities, even with some adjustments, was not appropriate. The Board therefore rejected the SOCAN Agreements as an appropriate benchmark.

Left with no reliable evidence to set a tariff, the Board turned to the Settlement Tariff proposed by all Parties. After analysis, the Board decided to certify the Settlement Tariff, with some adjustments with respect to the use of recorded music as background music and for skating, since it was determined that the FCA's decision did not set aside the decision and the rates originally set for those activities.

The Board nevertheless expressed some concerns about representativeness issues of the parties who negotiated the Settlement Tariff and the timing of the agreement, but found that under the circumstances it was preferable to certify the proposed Settlement Tariff with some adjustments.

The rates certified were the following:

Use of Music/Activities	Royalties Payable
Background Music (Fitness Venues)	3.2% of the amount paid to subscribe to a third-party music supplier or 0.0831¢ per admission
Fitness and Dance Classes	Amount per class: 31.0¢ (2008) 31.9¢ (2009) 32.8¢ (2010) 33.8¢ (2011) 34.8¢ (2012)
Skating	0.44% of the gross receipts from admissions, subject to a minimum of $38.18 Flat fee of $38.18 per year per venue if no admission fee is charged

SOCAN

July 18, 2014 – SOCAN Tariffs Nos. 22.D.1 (Audiovisual webcasts) and 22.D.2 (Audiovisual user-generated content), 2007-2013

In March of 2006 to 2012, SOCAN filed its proposed tariff for audiovisual webcasts (Tariffs 22.4 and 22.D, hereafter Tariff 22.D.1) and for audiovisual user-generated content (Tariffs 22.7 and 22.G, hereafter Tariff 22.D.2) for the years 2007-2013.

Apple Canada and Apple Inc. (Apple), Bell Canada, Yahoo! Canada, Rogers Communications, and Quebecor Media Inc. (collectively "the Services"), the Canadian Association of Broadcasters (CAB), the Canadian Broadcasting Corporation (CBC), YouTube LLC (YouTube), Cineplex Entertainment LP (Cineplex), the Computer and Communications Industry Association (CCIA), Shaw Communications Inc. (Shaw), and Pandora Media (Pandora) filed objection to one or both tariffs. In addition, Pandora filed a request to intervene in respect of Tariff 22 (Internet) specifically for the year 2011.

On April 29, 2011, the Board ruled that these tariffs would be heard jointly for the years 2007-2011. A hearing was scheduled for June 19, 2012. Prior to the filing of evidence, CCIA, Shaw and Pandora withdrew their objections. SOCAN filed its statement of case on March 5, 2012. On May 25, 2012, all the objectors jointly requested an indefinite postponement to file their statement case, citing ongoing negotiations with SOCAN. SOCAN agreed to the request. On November 28, 2012, SOCAN filed settlement agreements for Tariff 22.D.1 and Tariff 22.E (CBC), both for the period of 2007-2013. On March 20, 2013, SOCAN filed the agreement for Tariff 22.D.2 for the period of 2007-2013.

On March 26, 2013, the Board contacted the objectors who were not a party to the agreements and addressed questions to verify if they were users under the proposed tariffs and if so, to obtain their view on the proposed agreements. Entertainment Software Association and Entertainment Software Association of Canada (ESA) and Music Canada withdrew from the proceedings while Facebook, Netflix and CAB sent comments on the agreements on April 16, 2013; YouTube sent comments on May 21, 2013. On July 2, 2013, the Board granted leave to Netflix to reply and adduce additional evidence except insofar as it pertains to fair dealing.

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Because of the decision of the Supreme Court in *ESA*, the Board assumed (in error, later corrected through an erratum) that the proposed agreements do not make reference to downloads. In fact, the decision in *ESA* meant that SOCAN no longer has the right to collect royalties for permanent downloads and limited downloads.

The agreement for Tariff 22.D.1 agreement divides streaming revenues into three sources: per-program fees from end-users, subscription fees from end-users, and advertising revenues. The rate is 1.7 per cent for 2007-2010 and 1.9 per cent for 2011-2013. There are four adjustment factors in the agreement which has the effect of reducing the royalties otherwise payable. The agreement relating to Tariff 22.D.2 is very similar and calls for a rate of 1.7 per cent of relevant revenues for 2007-2010 and 1.9 per cent for 2011-2013.

SOCAN asked the Board to certify the tariffs based on the filed agreements, for the period of 2007-2013. SOCAN argued that the parties to the agreements represented the interests of all prospective users and that relevant comments made by former and non-parties have been addressed.

Facebook made comments to both proposed agreements, arguing that the tariffs don't apply to it and proposing several changes. One of them was about how to measure pages. Netflix argued that for Tariff 22.D.1, free trials are fair dealing for the purpose of research, in a manner analogous to Apple's free previews, which the Board considered, in an earlier decision, as fair dealing and therefore not subjected to the tariff. Netflix also submitted that royalties on free trials would be a violation of the Supreme Court principle of technological neutrality established in *ESA*. Netflix also contested the payment of minimum fees for trials.

The Board concluded that the signatories of the agreements are representative since they are the largest providers of audiovisual content in Canada other than YouTube, that other providers had the opportunity to object and have chosen not to do so, that the agreements are the result of extensive negotiations between experienced counsel, and that the tariff is not one of first impression. Therefore, there are no reasons not to certify the tariffs pursuant to the agreements.

The Board rejected most of Facebook's proposed changes, concluding that they were not justified, but accepted the modification on how to measure pages. With respect to the arguments raised by Netflix, the Board rejected them all. First, since there is no alternative technology equivalent to a Netflix free trial, there is no issue with technology neutrality. Second, the analogy between free previews and free trials is weak. In a free preview, the customer can hear a portion of a musical work in a degraded format. In a free trial, the customer can hear complete musical works, to the extent that they are fixed in the audiovisual work being watched. Furthermore, without evidence on market dominance by Netflix, an analysis of its policy on free trials would be incomplete with respect to the overall video industry. Finally, the Board does not have the evidentiary base to make a decision on fair dealing. The Board also rejected Netflix's argument on the payment of minimum fees.

The Board certified the tariffs as per the filed agreements with the addition of the Facebook clause for measuring pages.

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The rates certified were the following:

Tariffs	Royalties Payable
22.D.1 – Online audiovisual services	*(a)* For a service that charges per-program fees to end users: 1.7% (2007-2010) and 1.9% (2011-2013) of the amounts paid by end users, subject to a minimum of 1.3¢ per program communicated; *(b)* For a service that offers subscriptions to end users: 1.7% (2007-2010) and 1.9% (2011-2013) of the amounts paid by subscribers. In the case of free trials, a minimum monthly fee of 6.8¢ (2007-2010) and 7.5¢ (2011-2013) per free trial subscriber applies; *(c)* For a service that receives Internet-related revenues in connection with its communication of audiovisual works: 1.7% (2007-2010) and 1.9% (2011-2013) × A × B × (1 – C), where: "A" is the service's Internet-related revenues, "B" is *(i)* the ratio of audiovisual page impressions to all page impressions, if available, and *(ii)* if not, 0.95 for a music video service, and 0.75 for any other service; "C" is *(i)* 0 for a Canadian service, *(ii)* for any other service, the ratio of non-Canadian page impressions to all page impressions, if that ratio is available, and 0.9 if not; *(d)* A service with revenues from more than one of the categories in paragraphs *(a)*, *(b)* and *(c)* shall pay royalties in accordance with each applicable paragraph, but the calculation in paragraph *(c)* shall exclude any fees charged to end users pursuant to paragraphs *(a)* and *(b)*, and the related page impressions; and *(e)* A service with no revenue shall pay an annual fee of $15
22.D.2 – User-generated content	1.7% (2007-2010) and 1.9% (2011-2013) of the service's relevant revenues. A service with no revenue shall pay an annual fee of $15

July 25, 2014 – SOCAN Tariff No. 4 (Concerts), 2009-2014

In March 2008, 2009, 2010, 2011 and 2012, and in April 2013, SOCAN filed its proposed Tariffs 4 (Concerts) for the years 2009 to 2014.

Tariffs 4.A.1, 4.A.2, 4.B.1 and 4.B.3 for the years 2009 to 2013

By July 15, 2011, the objectors to Tariffs 4.A.1, 4.A.2, 4.B.1 and 4.B.3 for the years 2009 to 2011 had all withdrawn their objections. For the year 2012, Live Nation Canada Inc. and Maple Leaf Sports Entertainment Ltd. (MLSE) objected to Tariffs 4.A.1 and 4.B.1.

However, on August 17, 2011, following a SOCAN audit of concerts organized by Live Nation in 2009 and 2010, Live Nation sought leave to intervene in respect to Tariff 4 for the years 2009 to 2011. MLSE, l'*Aréna des Canadiens* and Sony Centre also sought leave to intervene. The Board granted all requests so that it could settle the parties' disagreement over the meaning of "gross receipts".

On April 11, 2012, the Board concluded that it would have to join the 2009-2011 and 2012 cases as it would be more efficient to deal with all the issues regarding the tariffs applicable to concerts in a single proceeding. As of June 2012, the sole remaining interveners were Live Nation Canada Inc. and MLSE.

On June 5, 2013, SOCAN notified the Board that it had reached an agreement with Live Nation and MLSE. Having abandoned the issue of clarifying the definition of "gross receipts" in the tariff for the years 2009 to 2011, the parties requested that Tariffs 4.A.1, 4.A.2, 4.B.1 and 4.B.3 for the years 2009 to 2011 be certified as filed by SOCAN.

For the years 2012 and 2013, the parties proposed that the rates and tariff bases remain unchanged. They also proposed a wording which integrated the changes proposed by SOCAN and a less restrictive version of the proposed administrative provisions.

The Board certified Tariffs 4.A.1, 4.A.2, 4.B.1 and 4.B.3 for the years 2009 to 2013 pursuant to the agreement signed by SOCAN, Live Nation and MLSE. The Board also certified these same tariffs for the year 2014 as filed by SOCAN since they were essentially identical to those that were subject of an agreement for 2009 to 2013 and the sole party objecting to them, the Toronto 2015 Pan Am/Parapan Am Games Organizing Committee, withdrew.

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Tariff 4.B.2 for the years 2013 and 2014

Tariff 4.B.2 for the years 2008 to 2012 was certified on March 20, 2008. No objections were filed in respect of this tariff for 2013 and 2014. On September 14, 2012, SOCAN filed an agreement with Orchestras Canada regarding the years 2013 and 2014. SOCAN and Orchestras Canada requested, at the same time, that the Board certify Tariff 4.B.2 in accordance with their agreement. The Board certified Tariff 4.B.2 for the years 2013 and 2014 pursuant to the agreement between SOCAN and Orchestras Canada.

The rates certified by the Board are the following:

Categories of Tariff	Rate
4.A – Popular Music Concerts	
4.A.1 – Per event licence	3% of gross receipts or fees paid to performing artists, Minimum fee of $35
4.A.2 – Annual licence	3% of gross receipts or fees paid to performing artists, Minimum fee of $60
4.B – Classical Music Concerts	
4.B.1 – Per concert licence	1,56% of gross receipts or fees paid to performing artists Minimum fee of $35
4.B.2 – Annual licence for orchestras	**Annual Fee (× total number of concerts)**

Annual Orchestra Budget	2013	2014
$0 to $100,000	$71	$72
$100,001 to $500,000	$115	$116
$500,001 to $1,000,000	$187	$189
$1,000,001 to $2,000,000	$234	$236
$2,000,001 to $5,000,000	$390	$394
$5,000,001 to $10,000,000	$428	$432
Over $10,000,000	$467	$472

4.B.3 – Annual licence for presenting organizations	0,96% of gross receipts or fees paid to performing artists Minimum fee of $35

November 29, 2014 – SOCAN Tariffs Nos. 22.D.1 (Audiovisual webcasts) and 22.D.2 (Audiovisual user-generated content), 2007-2013 – *Erratum*

On July 18, 2014, the Board issued its decision for Tariffs 22.D.1 and 22.D.2. These Tariffs reflected agreements between the parties that were filed with the Board. The Decision was clear with respect to the Board's intention related to the fact that SOCAN did not have the right to collect royalties for permanent and limited downloads. However, the Board made an error in expressing its manifest intention in assuming that neither agreement made reference to downloads, and in certifying, as requested by the parties, Tariffs that reflected the terms and conditions of the agreements.

The Board issued corrected version of the Tariffs, eliminating any reference to downloads.

SODRAC

November 27, 2014 – SODRAC v. ARTV

On September 30, 2011, SODRAC asked the Board to set the terms and conditions of a licence, interim and then final, authorizing ARTV to reproduce works in its repertoire from September 30, 2011 to September 30, 2014.

SODRAC requested the interim extension of the terms and conditions of the licence agreement previously agreed upon by the parties and that expired on August 31, 2011. On January 5, 2012, the Board granted SODRAC's application.

With respect to the final licence, the parties had agreed not to proceed on the merits until the Board had issued its decision in the arbitrations between SODRAC and the CBC and SODRAC and Bell Media (then Astral) for 2008-2012.

On November 2, 2012, the Board issued its decision in respect of those arbitrations. CBC and Astral applied for judicial review of the decision. On March 31, 2014, the Federal Court of Appeal issued its decision. On September 4, 2014, the Supreme Court granted CBC leave to appeal the decision. The case was heard on March 16, 2015. Given the foregoing, no final decision has been issued in this file for the period 2011-2014.

On September 30, 2014, SODRAC asked the Board to set the terms and conditions, interim and final, of a licence authorizing ARTV to reproduce works in its repertoire from October 1, 2014 to March 31, 2016. SODRAC requested the interim extension of the licence agreement, which the Board had already extended once as per the interim decision of January 5, 2012, until a final decision be issued. ARTV agreed with SODRAC's request. Given that the 2008-2012 SODRAC-CBC arbitration decision was before the Supreme Court, the parties once again agreed not to proceed on the merits until a final decision is issued in this matter.

On November 27, 2014, the Board granted SODRAC's application.

Unlocatable Copyright Owners

Pursuant to section 77 of the *Act*, the Board may grant licenses authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires the applicants to make reasonable efforts to find the copyright owner. Licenses granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year 2014-15, 29 applications were filed with the Board and the following 7 licenses were issued:

- *Jack de Keyzer*, Courtice, Ontario, for the mechanical reproduction of a musical work;
- *NYM Ministries*, Dryden, Ontario, for the mechanical reproduction of a musical work;
- *NYM Ministries*, Dryden, Ontario, for the mechanical reproduction of a musical work;
- *National Film Board of Canada*, Toronto, Ontario, for the incorporation, the public performance, the reproduction and the communication to the public by telecommunication of two images;
- *NYM Ministries*, Dryden, Ontario, for the public performance, the reproduction and the synchronization of two musical works;
- *Jane Nicholas*, Thunder Bay, Ontario, for the reproduction of a painting; and,
- *National Film Board of Canada*, Vancouver, British Columbia, for the synchronization and the communication to the public by telecommunication of a musical work.

Court Proceedings

Federal Court of Appeal

Two applications for judicial review were filed with the Federal Court of Appeal in 2014-15:

- *Netflix Inc. v. SOCAN et al.* (File: A-369-14), on August 15, 2014, in respect of SOCAN Tariff 22.D.1 for audiovisual webcasts of musical works, 2007-2013 (Decision of the Board, July 18, 2014); and,
- *Re:Sound v. Canadian Association of Broadcasters et al.* (File: A-294-14), on June 16, 2014, in respect of Re:Sound Tariff 8 for non-interactive and semi-interactive webcasts of sound recordings (Decision of the Board, May 16, 2014).

One application for judicial review was decided by the Federal Court of Appeal in 2014-15:

October 20, 2014 – *CAFDE v. SODRAC*, 2014 FCA 235 (Files A-265-13, A-525-12), in respect of SODRAC Tariff No. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition, 2009-2012)

On November 2, 2012, the Board certified *SODRAC Tariff No. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012.*

On December 3, 2012, the Canadian Association of Film Distributors and Exporters (CAFDE) asked the Board to amend this tariff. CAFDE alleged that the Board, after stating that it wished to certify the tariff proposed by CAFDE, had certified something different. CAFDE wished to have this error rectified.

On December 20, the Board suspended the application of the Tariff for 2009-2012 and granted CAFDE's application to reopen its decision. On April 26, 2013, the Board issued its reasons. The Board explained that its original decision was made on the basis of a misinterpretation of CAFDE's proposal. After recognizing that it had erred in its original decision, the Board concluded that it had the authority to correct its decision, on the grounds that the error was palpable and had led to the certification of a tariff *ultra petita*. The Board also indicated that it would issue its redetermination decision at a later time. The decision to reopen was not the subject of an application for judicial review.

On July 5, 013, the Board rendered its redetermination decision. The tariff structure it retained is not the one CAFDE had proposed. On August 6, 2013, the applicant filed an application for judicial review of the redetermination decision. CAFDE was asking the Court to set aside the redetermination decision and to substitute its original proposition.

SODRAC's main argument was that the applicant was precluded from challenging the Board's authority to reopen its original decision and to consider it afresh because the decision to reopen had not been judicially reviewed.

In its decision rendered on October 20, 2014, the Court rejected SODRAC's argument. Normally, an error recognized in a redetermination decision and the required correction generally go hand in hand. Here, the Board chose to split the process into two. Nevertheless, the redetermination decision became necessary by reason of the Board's setting aside of its original decision in the decision to reopen. In fact, the decision to reopen must be seen as part of a continuum that started with the original decision and concluded with the redetermination decision.

With respect to whether the Board had the authority to correct its error, the Court concluded that the Board did not have the authority to reopen and redetermine its original decision on the ground that it had made a palpable error. The correction of a palpable error is not one of the recognized exceptions to the *functus officio* rule. Rather, it is the role of the Federal Court of Appeal, seized with an application for judicial review, to determine the validity of the original decision. In acting as it did, the Board seems to have performed a judicial review of its own decision.

Therefore, the Court allowed the application for judicial review, set aside the original decision and the redetermination decision, and ordered that the matter be referred back to the Board so that it could recommence and complete the process to certify a new tariff for the years 2009 to 2012.

Federal Court

March 6, 2015 – *Rogers Communications Partnership et al. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FC 286

The Plaintiffs (Rogers Communications Partnership, Telus Communications Company, Bell Mobility Inc. and Quebecor Media Inc.) brought an action to recover royalties paid to SOCAN for ringtones and ringbacks downloaded by their subscribers between 2003 and 2012. The royalties were paid pursuant to two tariffs certified by the Copyright Board of Canada (the "Board") for the communication to the public by telecommunication of musical works embodied in ringtones and ringbacks: SOCAN Tariffs 24 for the years 2003 to 2005 and for the years 2006 to 2013.

The first Tariff 24 (2003-2005) was certified by the Board on August 18, 2006. The Plaintiffs unsuccessfully challenged it in a judicial review application before the Federal Court of Appeal. Subsequently, the parties entered into an agreement setting out the terms and conditions for ringtone royalties to be paid for the years 2006 to 2013. The Board then certified the second Tariff 24 (2006-2013) on June 29, 2012. This decision was not challenged on judicial review.

In July 2012, the Supreme Court of Canada released two decisions[1] that affect the validity of Tariff 24 and the correctness of the Federal Court of Appeal's reasoning in the aforementioned judicial review application. In these two decisions, the Supreme Court held that the transmission of ringtone downloads does not amount to a communication of musical works to the public by telecommunication.

After these decisions were handed down, the Plaintiffs, believing that the Supreme Court's conclusions with respect to downloads applied equally to ringtones, took the position that Tariff 24 was no longer valid, and stopped paying royalties to SOCAN for ringtones.

In light of *ESA* and *Rogers*, the Plaintiffs applied to the Board to vary its Tariff 24 decisions. The Board declined. It ruled that the Plaintiffs' application related to the enforcement of its earlier decisions, an issue it thought was best dealt with by the Federal Court. It is then that the Plaintiffs introduced the action against SOCAN.

At the Federal Court, the Plaintiffs' position was that they were owed about $15 million in ringtone royalties that should never have been paid. SOCAN, for its part, argued that its members were owed about $12 million for royalties the Plaintiffs refused to pay after the Supreme Court's rulings in *ESA* and *Rogers*.

1 *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283 [*Rogers*]; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 231 [*ESA*].

Copyright Board of Canada

In its decision, the Court framed the issues to be decided as follows:

1. Has the Plaintiffs' claim already been finally decided against them?
2. Based on their agreement with SOCAN, are the Plaintiffs precluded from claiming the relief they seek?
3. Is the Internet transmission of a ringtone file a communication of a musical work to the public?
4. Did the Board have jurisdiction to certify Tariff 24?
5. Was SOCAN unjustly enriched when it received Tariff 24 royalties?
6. Are the Plaintiffs entitled to an order tracing the distribution of Tariff 24 royalties?

As a preliminary matter, the Court held that neither the judicial review application nor the agreement with SOCAN precluded the Plaintiffs from bringing the claim.

The Court dismissed SOCAN's counterclaim to recover unpaid royalties for ringtones until the end of 2013. The Court held that the Supreme Court decisions were binding and rendered Tariff 24 unenforceable as downloads do not involve the right of communication to the public by telecommunication. It was further held that the agreement with SOCAN was unenforceable since it was entered into for the purpose of determining the quantum of royalties payable, and was premised on the belief that the royalties were required by law.

The Court also dismissed the Plaintiffs' claim. Even though they established a *prima facie* absence of a juristic reason for the royalty payments, it was not until the Supreme Court decisions that the parties were put on notice that there was a serious possibility that the legal foundation for Tariff 24 was faulty. Until that time, the reasonable expectations of the parties was that SOCAN was legally entitled to payment of the ringtone royalties and that the Plaintiffs were required to pay them. The Court mentioned that had the Plaintiffs continued to pay royalties for ringtones after the Supreme Court released its decisions, a tracing order might have been justified.

This decision was appealed to the Federal Court of Appeal by the Plaintiffs and SOCAN filed a cross-appeal.

Agreements Filed with the Board

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licenses for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties and the related terms and conditions of the license.

In 2014-15, 137 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright filed 36 agreements granting educational institutions, language schools, non-profit associations, copy shops and others a licence to photocopy works in its repertoire. Access Copyright also filed one agreement jointly with Copibec in respect of the government of Canada.

Copibec filed 87 agreements concluded, in particular, with various educational institutions, municipalities, non-profit associations and other users.

CMRRA filed 9 agreements. Four agreements were filed by CBRA.